

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:
	:
-vs-	: Criminal No. 3:01cr147 (PCD)
	:
JOSE ARMANDO LEIVA-DERAS	:

RULING ON DEFENDANT’S MOTION TO DISMISS THE INDICTMENT

Defendant Jose Armando Leiva-Deras moves to dismiss the one-count indictment arguing that a charge of reentry by a removed alien in violation of 8 U.S.C. § 1326(a) & (b)(2) may not be predicated upon deportation proceedings that violated his right to due process. For the reasons set forth herein, the motion is denied.

I. BACKGROUND

On January 1, 1983, defendant immigrated to the United States from El Salvador. On June 16, 1989, he plead guilty to the felony charge of sale of marijuana in violation of CAL. HEALTH & SAFETY CODE § 11360 and was sentenced to six months’ imprisonment and three years’ probation. On December 20, 1989, the Immigration and Naturalization Service (“INS”) notified defendant that his conviction for the sale of marijuana and his entry into the United States without inspection by an Immigration Officer rendered him deportable pursuant to §§ 241(a)(2) & 241(a)(11) of the Immigration and Nationality Act. On January 26, 1990, defendant was ordered deported. No appeal of the order was filed and the order of deportation reflected that defendant waived his right to appeal. On February 15, 1990, defendant was deported to El Salvador. Defendant, however, returned to California as on March 15, 1991, defendant’s probation was revoked and he was ordered to serve a

four-year sentence. On May 2, 1991, the INS became aware of defendant's California incarceration under the name of Jose Leyva-Deras. On February 3, 1993, the INS notified defendant that his conviction for the sale of marijuana rendered him deportable pursuant to § 241(a)(2)(B)(I) of the Immigration and Nationality Act. On February 9, 1993, defendant was again ordered deported and the order reflected defendant's waiver of appellate rights. No appeal to the second order was filed. On February 24, 1993, defendant was deported to El Salvador.

On May 28, 2001, the INS received a report that defendant was in the custody of the Stamford Police Department. On July 27, 2001, an indictment was filed charging defendant with reentering the United States on May 8, 2001, after his deportation on February 24, 1993, in violation of 8 U.S.C. §§ 1326(a) & (b)(2).

II. DISCUSSION

Defendant alleges that he participated in mass deportation proceeding resulting in both deportation orders. The presiding Immigration Judges did not engage in an individual colloquy with him in those proceedings, instead requesting a collective waiver of the right to appeal by all respondents to the deportation proceedings. Defendant argues that this procedure violated his right to due process and thus the Government may not rely on the two deportations as satisfying an element of the illegal reentry charge against him. The Government responds that defendant has not met his burden in collaterally attacking the lawfulness of the deportation orders as required by 8 U.S.C. § 1326(d).

Defendant is charged with a violation of 8 U.S.C. § 1326(a), reentry by a removed alien, which provides in relevant part: "any alien who . . . has been . . . deported . . . and thereafter . . . is at any time found in . . . the United States . . . shall be fined . . . or imprisoned not more than 2 years, or both."

Collateral attack on the deportation is permissible where the alien is deprived of the right to judicial review of the disposition of the deportation hearing when such disposition is used to establish an element of the offense. *United States v. Fares*, 978 F.2d 52, 56 (2d Cir. 1992). Collateral attack is, however, precluded unless the defendant demonstrates (1) exhaustion of administrative remedies available; (2) the deportation proceedings at which the order issued deprived the defendant of an opportunity for judicial review; and (3) the entry of the deportation order was fundamentally unfair. 8 U.S.C. § 1326(d). As the three elements are conjunctive, the defendant's collateral attack fails if any element is not satisfied.

Assuming, arguendo, that defendant could satisfy the first two elements of 8 U.S.C. § 1326(d), he cannot satisfy the third. In order to mount a successful challenge to a due process challenge to the lawfulness of the deportation proceedings, a defendant must establish that he was prejudiced by the denial of judicial review. *United States v. Fernandez-Antonia*, 278 F.3d 150, 158 (2d Cir. 2002); *United States v. Paredes-Batista*, 140 F.3d 367, 378 (2d Cir. 1998). This correlates with the requirement that defendant demonstrate that the deportation was "fundamentally unfair" pursuant to 8 U.S.C. § 1326(d). There is no prejudice when "a fully informed exercise of the right of direct appeal would have yielded the alien no relief from deportation." *Fares*, 978 F.2d at 57. Defendant therefore "must make a prima facie showing that he would have been eligible for the relief and that he could have made a strong showing in support of his application." *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994). This he cannot do.

Defendant argues that a mass deportation proceeding is improper, that as a consequence of the proceeding he "received neither a proper explanation of his appellate rights nor any explanation of his

possible avenues for relief” and thus “prejudice must be presumed.” This argument runs contrary to the law of this Circuit.

[I]n order for an alien to demonstrate on collateral review that his hearing was so fundamentally unfair that it constituted a denial of his Fifth Amendment right to due process, he must show both a fundamental procedural error and prejudice resulting from that error. In order to show prejudice, he must show that, absent the procedural errors, he would not have been removed.

Fernandez-Antonia, 278 F.3d at 159. Procedural defects in a deportation proceeding, in and of themselves, will not establish prejudice. *See id.* Defendant must establish that he would have been entitled to relief from the deportation order but for the denial of his right to appeal. *See Fares*, 978 F.2d at 57. Having failed to propound any basis on which he would have been so entitled,¹ his collateral attack on the deportation proceedings must fail.

III. CONCLUSION

Defendant’s motion to dismiss the indictment (Doc. 11) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, April ___, 2002.

Peter C. Dorsey

¹ Defendant alleges that the Immigration Judge failed to inform him of the possibility for a suspension of deportation pursuant to 8 U.S.C. § 1254(a) (1990). Defendant does not argue that he would have been entitled to discretionary relief, other than stating that he met the seven-year residence requirement. He does not argue that he could have satisfied the additional requirements for discretionary relief, that deportation would cause him “extreme hardship” and that he satisfied the definition of “good moral character.” 8 U.S.C. § 1254(a)(1) (1990). As such, he has failed to establish his entitlement to discretionary relief.

United States District Judge